

In the Name of Allah Most Gracious Most Merciful

EXTERNAL CONSTRAINTS FOR AWQAF IN NON-MUSLIM COUNTRIES

By:

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1.0 INTRODUCTION

One third of the total population of Muslims in the world, live in non-Muslim countries. (Black, Esmaeli, Hosen, 2013). Non-Muslim countries are generally countries where Muslims are a minority such as in most Western countries like those in Europe, Canada, Australia and New Zealand and also some other countries across the world such as South Africa, India, China and Japan. Some other possible categorisations of non-Muslim countries are as follows:

1. Another religion other than Islam is the official state religion, e.g. Thailand (there are 15 of such states).
2. Islam is officially banned as a religion, as widely reported to be done in Angola in November 2013, but later denied by the country.³ There is fear of banning Islam in France in 2017.⁴ Islam is also not allowed in Vatican City.⁵
3. There is official hostility, legally or politically documented, against Islam/Muslims, on non-Islamic grounds/ethics (e.g. France with its official banning of the use of *Hijab*; Angola with strict restrictions on Muslims refusing to register Muslim organisations and denying them freedom to build mosques⁶; Myanmar with 'ethnic' cleansing of the Rohingya who are predominantly Muslim.)
4. Non-Muslims are in the majority or Muslims are in a minority group/bloc, e.g. Ghana, Kenya, Uganda.

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³ https://en.wikipedia.org/wiki/Islam_in_Angola (14 April, 2016)

⁴ <http://speisa.com/modules/articles/index.php/item.1316/is-france-going-to-ban-islam-in-2017.html> (14 April, 2016)

⁵ <https://answers.yahoo.com/question/index?qid=20110621102451AAiswPz>

⁶ https://en.wikipedia.org/wiki/Islam_in_Angola

5. Secularity officially upheld, e.g. North Korea (where religion is not allowed);⁷ the Russian Republic, USA.
6. Multi religious culture without preference to Islam or any other religion is upheld, but with non-Muslim majority e.g. Singapore, India.
7. Where there are no Muslims at all, e.g. Vatican City.⁸

This paper examines awqaf generally in non-Muslim countries, with particular case studies on waqf in the United Kingdom, India and Singapore. It then goes on to identify constraints in the creation and development of awqaf generally and recommends ways in which to overcome those constraints. The methodology is doctrinal analysis based on a review of existing literature and news reports relating to waqf and Muslim minorities.

2.0 THE POSITION OF AWQAF IN NON-MUSLIM COUNTRIES

Historical evidence points to waqf and donations having been present as early as the early immigration of Muslims around the globe so much so that waqf is seen as an indicator of Muslim civilisation.

Although in the minority, the majority of Muslim communities living in non-Muslim countries have thrived and achieved self-sufficiency in the social, economic and religious spheres. This is perhaps due to the strong will of the communities to look out for each other, to protect their cultural and religious identities and to ensure the survival of the ummah. One must also not forget tremendous efforts made by the governments of Saudi Arabia and Kuwait in channelling much needed funds to many Muslim communities living in non-Muslim countries. Just last week we hear of the State of Kuwait contributing \$1.4 million to the construction of Canberra Islamic Centre and is considered to be the first major gift of its kind from Kuwait to Australia.

In the field of waqf, Muslim communities in South Africa, Australia, New Zealand and Canada have been able to move towards institutionalising waqf as a broad based community organisation, either as a trust or foundation or a company limited by guarantee or an NGO and operating mostly outside of government control.

In some other countries like India and Singapore, special laws relating to the administration of Muslim Law (Singapore) and waqf administration (India) have enabling provisions relating to waqf that are used for the socio-

⁷ <https://answers.yahoo.com/question/index?qid=20110621102451AAiswPz>

⁸ <https://answers.yahoo.com/question/index?qid=20110621102451AAiswPz>

economic development of the Muslims and hence, have recorded best practices that other non-Muslim countries can learn from.

It is noted that the development of awqaf in non-Muslim countries may adopt a 3 pronged approach to ensure sustainable development (Cajee, 2000):

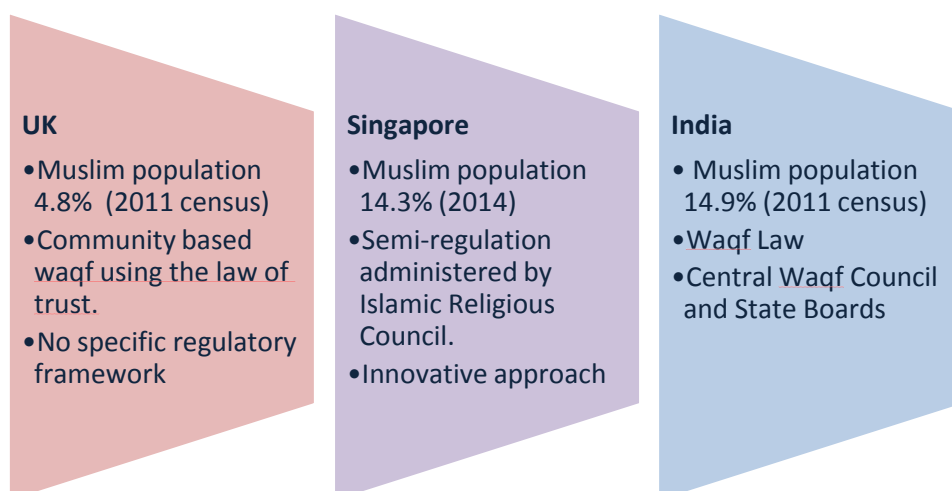
- i) Establish a National Awqaf Fund with provincial and community chapters;
- ii) Establish a financial services company to provide investment, assets management, project assessment and management and consulting services to the Awqaf Fund and its chapters;
- iii) Establish a variety of community empowerment projects and institutions supported by awqaf revenues and resources.

A comparison of three non-Muslim countries reveals that the management of awqaf or waqf projects in these countries can either operate within one of the following legal structures:

- i) Community based waqf projects operate within the existing conventional legal framework in such country, be it in the nature of a trust, a foundation, a company limited by guarantee of a non-governmental organisation (NGO);
- ii) Waqf is semi-regulated through a special law passed relating to regulating the personal law of Muslims in the country;
- iii) Waqf is regulated through a national legislation on waqf, establishing a central waqf body and then state waqf boards at state level.

Diagram 2.0 below illustrates this in respect of United Kingdom, Singapore and India.

Diagram 2.0: Comparison of Waqf Administration in UK, Singapore and India



United Kingdom

In the UK, there are a number of charitable organisations like Muslim Hands and Islamic Relief Worldwide, that operate waqf departments, but there is general scarcity in the specialisation of waqf management.

One prominent organisation is the Europe Trust based in Leeds. It was established in 1996 with an initial donation of £20,000 which was subsequently invested in a few Muslim owned companies, earning a 5-6 percent return per annum (M. Abdullah, 2015). The trust provides funds to community based projects, funding only institutions and not individuals. The current portfolio of Europe Trust stands at £8 million, including the value of mosques and real estate registered in the name of the trust. Since the nature of its underlying donated capital is waqf, the corpus of donations is carefully preserved. In view of the condition of perpetuity in waqf, the Trust further avoids high risk investments.

Another UK based waqf institution is Muslim Hands, instituted in 2008. It collects donations on the basis of cash waqf from individual donors, both as waqf contributions as well as subscriptions to waqf units in the form of certificates. The cash that are collected are then invested in shariah compliant ventures and the return of investments (around a 5 percent rate) is then channelled to specific charitable purposes.

What is interesting about Muslim Hands is its publicity initiatives. It employs a variety of fundraising initiatives including emails, TV advertisements, volunteer-oriented campaigns and approaching individuals in person, this being identified by officials at Muslim Hands as the most effective method of soliciting funds so far (M. Abdullah, 2015).

India

Despite the Muslims in India being a minority (14.2% of the population in 2011 but estimated to reach 180 million in number in 2015), Muslims there have been able to make significant strides in creating an enabling legal framework for waqf management. A Central Waqf Council was established in 1964⁹ by the Government of India and is placed presently under the Ministry of Minority Affairs. The Council advises the central government, state governments and the state waqf boards on due administration of awqaf. The government appoints members of the Central Waqf Council while each state assigns its own waqf board members. Waqf boards are engaged in any one of the

⁹ Under section 8A of the Wakf Act 1954 (now read as section 9(1) of the Wakf Act 1995).

following activities, namely, a) property registration management; b) muttawalli returns management; c) leasing of properties management; d) litigations tracking management.

Much has been written about the problems facing waqf in India.¹⁰ Some of the problems identified are:

1. Lack of serious effort to develop waqf properties;
2. Encroachment of waqf properties;
3. Waqf al-awlad being left without proper supervision;
4. Absence of democratisation and decentralisation of waqf administration;
5. The problem of a redundant Central Waqf Council; and
6. The problem of excessive government control.

Singapore

Singapore, being an important trading post in the colonial era of the 17th and 18th century, saw rich Arabs and Indian philanthropists coming to trade as merchants and later settling there. They built mosques and bought commercial properties that were rented out and generated a steady stream of income for the upkeep and maintenance of the mosques.

In 1968, the government of Singapore passed the Administration of Muslim Law Act and according to section 58 of that Act all waqf properties comes within the administration of the Islamic Religious Council of Singapore ('MUIS'). In 1995, due to problems of private trustees selling off waqf properties and mismanagement of waqf properties, the Act was amended to include provision for registration of all awqaf assets in Singapore. Beginning with this, MUIS has been able to strategies the development of the awqaf in Singapore into lucrative income generating properties. Knowing that it needed expertise in property investment and finance, MUIS recruited professionals such as civil engineers, architects and quantity surveyors as part of their team to manage waqf development portfolios. MUIS also adopted a joint venture approach in developing waqf properties. Using the musyarakah concept, MUIS entered into joint venture projects with WAREES, a property investment company – wholly owned subsidiary of MUIS and the waqif.

Using examples from Kuwait and Qatar, MUIS observed innovative financial uses to help unlock the potential of waqf. An integrated mixed-development

¹⁰ See Syed Khalid Rashid (2007), "Current Problems Facing Awqaf in India: Possible Solutions", AWQAF No. 12, Year 7, Jamada 1 1428 AH, May 2007 at pp. 11-28, Syed Khalid Rashid, *Waqf Administration in India: A Socio-Legal Study* (Vikas Publishing House, New Delhi, 1978), p.74, Muhammad Rizwanul haque, "Waqf Experiences in India" in Syed Khalid Rashid (ed.), *Awqaf Experiences in South Asia* (Institute of Objective Studies, New Delhi, 2002), p. 125 at 131.

project was successfully undertaken at Bencoolen Street, comprising a mosque, service apartments and a commercial complex, made possible through by the launch of the musyarakah bond. The proceeds have also been used to fund Islamic education and also to purchase medicine for the needy in Singapore, including non-Muslims.

From the above case studies, it can be seen that waqf has thrived in Muslim communities living in non-Muslim countries but there is much room for improvement through identification of internal and external constraints. This paper will delve into the external constraints generally applying to all non-Muslim countries.

3.0 EXTERNAL CONSTRAINTS

By external constraints, is meant, limitations imposed from outside the non-Muslim country. Although one might assume that awqaf in non-Muslim countries may suffer more internal constraints than external ones, globalisation which has resulted in the introduction of 'universal values' in the areas of human rights and international trade may have resulted in culmination and progression of external constraints in the creation and management of awqaf in non-Muslim countries. Additionally as will be pointed out in this paper, what may appear as an internal constraint may turn out to be an external one. Constraints can be further divided into three, namely, socio-political constraints, economic constraints and legal constraints.

3.1 SOCIO-POLITICAL CONSTRAINTS

3.1.1 ISLAMOPHOBIA AND STIGMA

Prejudice and hostility against Muslim communities, whether direct or indirect, are prevalent in the majority of non-Muslim countries in the world today and have often led to discrimination against Muslims, resulting in exclusion from main socio-economic activities.

3.1.2 CHANELLING OF EXTERNAL FUNDS LABELLED AS SUPPORTING TERRORISM

One of the main weaknesses of heavily relying on financial assistance from Muslim countries to develop awqaf properties in Muslim minority countries is that such assistance is adversely affected by fluctuating political or economic conditions of the granting countries. (Editorial, *AWQAF* 2010) Added to this currently is the global move towards combating terrorism

financing. In quick response to the 9/11 attack on the US and the growing incidences of terrorist activities across the world, the United Nations Security Council, through Resolution 1373 known as UNSCR 1373, supplemented the United Nations International Convention for the Suppression of the Financing of Terrorism 1999. This resolution introduced a new international legal regime for combating terrorism financing and came into force on 10th April 2002. (Roberto, L; 2000).

Since the event of 9/11 attack on the World Trade in the U.S., Islam and Muslims have come under global projection of close linkages with terrorism. This perception, though erroneous, is particular popular in non-Muslim countries. Establishment of waqf, which is an Islamic endowment in such countries, would therefore have serious challenges to gasp with when it comes to official responses that may greet such gestures in those countries. The following narration on the concern in the U.S. reflects this point:

“U.S. non profit organizations must be careful in granting funds to foreign charities under the rules prescribed in the Foreign Corrupt Practices Act (FCPA) regarding distributions to charities, which may have officers or directors who are government officials, in order to gain governmental access. Executive Order 13224 prohibits transactions between a domestic charity and foreign organizations the federal government deems to be a terrorist group or individuals associated with such groups. The Treasury Department of Foreign Asset Control lists embargoed countries.

The Supreme Court in *Holder v. Humanitarian Law Project*¹¹ upheld a ban on material support to groups designated as foreign terrorists by the Secretary of State. The Federal law banning material support for foreign terrorist organizations includes not only money or material but also training and expert advice or assistance. The facts in *Holder* detail an attempt to instruct the Kurdish separatist party known as the PKK to advance its goals through the peaceful use of international law. The Court noted that some terrorist groups may conduct both peaceful and violent activities, but Congress found that they may be so tainted by their criminal conduct that any contribution to such an organization facilitates their conduct. U. S. citizens remain free to advocate for the political aims of these groups under constitutional protected free speech as long as citizens do not coordinate with these groups. Chief Justice Roberts also wrote in the Court’s opinion that cases may exist in which some interaction with foreign terrorist groups could be constitutionally protected, but those difficult cases would have to be addressed in the future as they

¹¹ 561 U.S. (2010) Nos 08-1498 and 09-89, 21 June 2010

arise. Accordingly, until the Court rules otherwise, any provision of charitable assistance to a terrorist organization, including humanitarian aid, is “material assistance” precluded by Federal law.”¹²

Associated with this is the constraint posed by the media in regard to news reporting on the issue. Given that the media is being controlled by certain quarters, even Islamic charitable organisations have not been spared and have begun to be adversely affected. A recent example of this constraint can be seen from news reports identifying certain Islam based charitable organisations as being linked to terrorist groups and questioning of grants channelled to these agencies. It is reported that in 2014 the Islamic Relief Worldwide (IRW), a charitable relief agency operating from Birmingham, UK received USD270,000 from the U.S. Department of Health and Human Services earmarked for IRW’s project in Kenya relating to fighting infectious diseases. This and other such grants to IRW have been called into question by those seeking to associate IRW with so called ‘terrorist groups’ based on the allegation that IRW’s headquarters in the West Bank and Gaza are being manned by members of Hamas.¹³ Such news reports being circulated in internet news portals are one sided and biased but goes a long way in creating a negative perception towards the noble work of Islamic charitable organisations.

3.1.3 DIPLOMACY AND POLITICAL WILL FOR ENGAGEMENT WITH MUSLIM COUNTRIES

Buzan, Professor of International Studies at University of Warwick observed about the reason why industrialised nations see Islam and Muslim communities living within their countries as a threat are as follows:

“In the case of Islam, this threat is compounded by geographical adjacency and historical antagonism and also the overtly political role that Islam plays in the lives of its followers. Rivalry with the West is made more potent by the fact that Islam is still itself a vigorous and expanding collective identity.”

¹² Milton Cerny & Michele A.W. McKinnon, “The Globalization Of Philanthropy: International Charitable Giving In The Twenty-First Century”,

¹³ See www.trunews.com/feds-give270K-grant-islamic-charity-alleged-ties-hamas-muslim-brotherhood (accessed 21 April 2016)

3.2 LEGAL CONSTRAINTS

The legal constraints can be in different forms. It is not entirely a constraint affecting the donors from outside his own country alone, it may be from within his own country. The constraints may not really emanate from a specific country, but may be general and global in nature. The points below categorise such constraints:

i) **Constraints from the Country of the External Donor against Outside Donation, e.g. U.S. tax law: EC vs. ED = External Country vs. External Donation (Waqf) (constraints on the external waqf directly)**

This is a constraint which a wāqif (donor) from a non-Muslim country would face from within his own country which however constitutes an external constraint to the waqf he intends to create in another country. A typical example of this is the specific constraint which a U.S Citizen or Resident would face in floating any waqf outside the U.S., even if the waqf is to be established in a non-Muslim country. In this regard, where the Wāqif of a waqf to be endowed in any country, including non-Muslim countries, is a U.S. Citizen or resident, the U.S. tax law is a serious external hurdle to be crossed before such waqf can be effectively legally implemented.¹⁴

ii) **From the Country of the External Beneficiary against Foreign Donation: IC vs. ED: Internal Country vs. External Donation (Waqf) (constraints on the internal beneficiaries)**

As a country's law may constitute a constraint against establishment of waqf by its citizen or resident in a foreign country, the law of a non-Muslim country may also constitute a constraint against receipt of waqf by the targeted beneficiaries.

iii) **Restrictions on the Global Nature of Islamic Law**

Islamic law still suffers from global restrictions in its recognition and application. Since waqf is governed by Islamic law, the global restriction it suffers, which will be more manifest in non-Muslim countries constitute a substantial external impediment to the institution of waqf in non-Muslim countries.

¹⁴ Milton Cerny & Michele A.W. McKinnon, "The Globalization Of Philanthropy: International Charitable Giving In The Twenty-First Century", *FALL 2010, 45 REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL*, pp. 4-30; available at <https://www.mcguirewoods.com/news-resources/publications/taxation/globalization-of-philanthropy.pdf> (accessed on 14 April, 2016)

iv) Absence of International Model Waqf Law with Clarity on Foreign or International Waqf

The legal frameworks in managing awqaf assets are little understood on a cross-national level. (Baird-Zars, Amirtahmusabi, Darrat, 2015) In the 19th century, different Muslim countries started noticing the potentials for developing their awqaf properties and began legislating on awqaf management based on their respective existing legal and administrative frameworks. Until the Islamic Development Bank (IDB) and Kuwait Awqaf Public Foundation (KAPF) introduced an international model waqf law, there was a noticeable gap in this regard. Does the law clarify the position of waqf created in foreign countries or the case of an international waqf?

v) Requirements for Regulation of the Waqf by Islamic Law and lack of recognition for Islamic Law in the state laws of the non-Muslim countries.

This constraint is especially prevalent in western countries where the legal system does not accord any recognition whatsoever to personal laws of the minority. Thus, in such jurisdictions, waqf develops along the lines of Islamic law as administered by the community without any formal state recognition. Waqf real estate property are still made subject to conventional real property law of the non-Muslim country and the restrictions that come with it. Dispute resolution mechanisms in respect of waqf disputes are not recognised by the formal courts and will be treated in most cases under the law of trust or foundations, that at times defeats the character of the waqf.

3.3 ECONOMIC CONSTRAINTS

Not many studies have been undertaken relating to the effect of the WTO and TPPA, for example, on waqf. These trade agreements have wide ranging impact and may impose further external constraints on awqaf.

In most non-Muslim countries, awqaf comes within the framework of trusts and 'endowments' and is treated as the third sector of the economy, run by non-governmental entities or organisations (NGOs). Created as not for profit organisations, each endowment is goal directed and there must be evaluation and measurement of its

performance and effectiveness. In the United States for example, privately endowed institutions play a larger social and economic role than in Europe. (El-Ansary, 2010).

In a globalised world where trade agreements rule the economy of countries and multi-national companies take on a larger role driven to maximise profits and return, it is uncertain whether awqaf in non-Muslim countries are able to thrive. Nevertheless, the potential benefits of modern awqaf is not yet widely appreciated and can solve many socio-economic problems.

4.0 SUGGESTIONS AND RECOMMENDATIONS TO OVERCOME CONSTRAINTS

There is a dire need for waqf practitioners and researchers in Islamic waqf to be able to respond to these constraints and strategise on ways to overcome them. Instrumental in this regard is the role played by main waqf players in the world today, namely the IDB and KAPF. The ongoing engagement and projects with Muslim communities living in non-Muslim countries should be strengthened and continued.

Awareness on the sunnah relating to waqf must be made known and be disseminated to all Muslim communities in the world today. In regard to research and development, it is observed that most of what is done in the Arab world is not effectively reaching non-Arabic speaking Muslims. There is a need for wide dissemination of knowledge on waqf through the media, public discourse, reading material and training programs targeting not only waqf practitioners but also students in schools and universities who will become the trustees and managers that will catalyse for the growth of the waqf sector in the near future. Raising awareness about the significance of waqf across communities and involving them in the process is crucial. The culture of waqf as a way of life should be revitalised and ingrained amongst the Muslims today and not be left only as an alternative for the rich and powerful Muslims.

Waqf organisations in non-Muslim countries must strive to widen their network and involve a wider section of the community including non-Muslims for waqf is also a way of doing da'wah. For high net worth donors, it must be realised that the integrity and trustworthiness of fundraisers is more important than the popularity and credibility of the charity they are working for. (M. Abdullah, 2015).

In the end, actions speak louder than words. It is no longer useful to be talking about the glory of waqf in early Muslim civilisation for there is a need to

translate the concept of waqf to be workable in the world we live in today. Notwithstanding the external constraints, Muslims themselves must work in unison to realise contemporary application of waqf in their daily lives.

5.0 CONCLUSION

A long time ago in England, early Fransiscan friars came into contact with the wide practice of waqf in Jerusalem and Egypt and brought this idea back to England to solve the problem of the Crusaders having to leave their properties to others on trust until they came back from the Crusades in the 11th century BC. This gave birth to the concept of 'uses' or the law of trust in England (Gaudiosi, 1988) said to be 'the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence.' (Maitland, 1936). It is therefore a bit ironic to be speaking about external constraints for awqaf in non-Muslim countries when originally, the concept of awqaf itself deeply influenced the evolution of property law in non-Muslim countries, as is evidenced in the United Kingdom.

As recent as 2011, we read in the Wall Street Journal (August 17, 2011) as follows:

"One of the most urgent economic problems facing the U.S. is the deplorable state of the country's roads, bridges, railways and other essential networks. In its latest report card in 2009, the American Society of Civil Engineers gave U.S. infrastructure a D. A recent report from the Organization for International Investment concluded that this poor infrastructure "is eroding the country's ability to attract and retain dynamic global companies that create high-productivity, high-wage jobs."

The WSJ then asked:

"Why shouldn't these citizens have the opportunity to invest directly in infrastructure projects of their choice, along with incentives to do so?"

The WSJ then explains:

"The 400 wealthiest Americans have a total net worth of \$1.53 trillion. The top 50 alone hold more than \$700 billion in personal wealth." Thus "Their donations could be combined with public funds, and they would receive tax benefits and naming opportunities."

The WSJ then points to a historical example:

"There is a precedent: **Ottoman-era Turkey** lacked a budget for the provision of basic services. To fill the void, more than 35,000 private foundations, known as **vakif** in Turkish, funded public-works projects

and municipal services, from water systems and schools to hospitals, bridges and roads. Many modern Turkish foundations have continued to supply traditional infrastructure—the Sabanci Foundation, for example, has built more than 120 schools, hospitals, libraries, orphanages and other facilities. These assets are then transferred to state ministries, which run them."

It is clear therefore, that despite the perception of constraints in the acceptance of Islamic based precepts like waqf in the western world, specifically, there are also instances that prove the readiness of non-Muslim countries (or sections of the society living there) to accept these concepts, especially when historical evidence abound in regard to the role of waqf in promoting civil society and provision of public services.

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